IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 1234 OF 2004

Shri Dattatraya Vitthal More & ors. ... Appellants

V/s

Shri Gopal Babaji More & anr. ... Respondents

Shri A. S. Gadkari for the appellants.

CORAM: P.V. KAKADE, J.

DATED: 1ST NOV., 2004.

P.C.:

1. This is an appeal preferred against the judgment and order passed by the District Judge, Pune, dated 2.1.2004 dismissing the appeal and confirming the judgment and decree passed by the Civil Judge, Jr.Divn., Vadgaon, Mamal by order dated 4.12.1993.

2. I have heard the learned counsel for the appellant. Perused the record.

The plaintiff filed the suit against the defendant for partition of the suit and separate possession of one half share in the suit property. According to the plaintiff, the suit property is the property jointly

owned by parties and it was purchased by his elder brother Mahadev Babaji More who died 40 years back and was unmarried, leaving behind him only legal heirs as his brothers i.e. plaintiff and one Vithal Babaji More. Said Vithal Babaji More died in the year 1976. According to him, defendants 1 to 8 are the legal heirs of deceased Vithal and as such defendants 1 to 8 are having 1/2 share in the suit property. It is submitted on behalf of the plaintiff that property is yet to be partitioned and, as such, suit for partition came to be filed with prayer for possession of separate share.

Defendants 1 to 8 challenged the suit denying the contentions raised by the plaintiff raising various contentions and sought dismissal of the suit.

The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved that he was entitled to decree of partition and separate possession. According to the learned Trial Judge, the plaintiff was having 1/3 share in the suit property instead of 1/2 share as claimed and decree was passed to that effect.

Being aggrieved by the said judgment and order, appeal

was preferred in the District Court, Pune. The learned District Judge, Pune, adjudicated the appeal on merits and concluded that the Trial Judge had rightly and correctly decided the dispute and in the result the appeal came to be dismissed. Hence the present appeal.

4. At the outset, it may be noted that there is absolutely no question of law involved in this appeal, leave aside any substantial question of law. In fact, on perusal of the record, it is seen that both the Courts below have virtually passed decree on admission. The written statement filed by the present appellant in the Trial Court reveals that the appellant admitted that the plaintiff had 1/3 share in the suit property and denied plaintiff’s claim of 1/2 share. In view of this position, nothing remains in this appeal. The decree is passed by both Courts below on the basis of admitted position that the plaintiff had 1/3 share in the suit property and, as such, this appeal need not be entertained at all.

In the result, the appeal stands dismissed in limine with no order as to costs.

Consequently, the civil application also stands

dismissed with no order as to costs.

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In the case of **Kondiba Dagadu Kadam v/s Savitribai sopan Gujar, reported 1999 SCC 2213,** the Apex Court has observed that in a case wherefrom given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. It is not within the domain of the High Court to investigate the ground in which the findings are arrived at by the last Court of fact being the first appellate Court. This is more so in the case wherein the only issue i.e. issue of adverse possession is is issue of fact is seem to be appreciated and adjudicated by the learned Appellate Court and, therefore, the appeal cannot be entertained under Sec. 100 of the C.P.C.

In the result, the appeal stands dismissed in limine.

Civil Application No. 91 of 2004 also stands disposed of.

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